IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 1562 OF 2005

M.V. Henry, Intelligence Officer ..Applicant.
Narcotics Control Bureau.

V/s.

Mohamed Salim and Others. ..Respondents.

Shri D.N. Salvi for the Applicant.
Shri A. G. Lalla for the Respondents.

CORAM : A.M.KHANWILKAR, J.
DATED : MARCH 10, 2005

PC :-

1. Heard counsel for the parties.

2. This Application is for cancellation of bail order granted by the Special Judge, Gr. Mumbai, dated 1st of March, 2005, on the ground of default under section 167 of the Code, in favour of the Respondents. The relevant facts for deciding the said application reckoned by the lower court can be stated thus :-

3. That the respondents were arrested on 24th December, 2004. As no charge-sheet was filed within 60 days, therefore, the Respondents filed the application for bail before the lower court on 24th

February, 2005. The applicant prayed for time to file reply to the said application. At the instance of the applicant, the matter was adjourned till 28th February, 2005. However, on the next date, i.e. on 25th February, 2005, charge-sheet came to be filed against the respondents. The bail application preferred by the respondents on the ground of default, was heard on 28th February, 2005 and the lower court eventually allowed the said application following the decision of the Apex Court in Uday Mohanlal Acharya vs. State of Maharashtra -2001 ALL MR (Cri) 713, by order dated 1st March, 2005, imposing certain conditions mentioned in the impugned order, amongst others, to execute P.R. bond of Rs. 25,000/- and furnish solvent surety in the like amount.

4. It is not in dispute that the respondents were not in a position to comply with the said conditions on 1st of March, 2005; for, later on they filed application before the lower court to modify the conditions by permitting them to furnish cash bail for a limited period.

5. On the above facts, it is argued on behalf of the applicant that despite the abovesaid order, the

Respondents have failed to furnish the sureties and the order has not been implemented. Relying on the dictum of the Apex Court in the case of Uday Mohanlal Acharya vs. State of Maharashtra (2001 ALL MR (Cri) 713, in particular, the conclusion No.5 in para 12, it is contended that the so called indefeasible right of the accused stood extinguished as the prosecution has already filed the charge-sheet before the appropriate court against the respondents in respect of the present offence. Accordingly, the present application has been filed on March 5, 2005 with the assertion that the bail order in favour of the Respondents is still not implemented and ought not to be given effect to as the right accrued to the respondents had extinguished, as they failed to furnish the bail "as ordered".

6. On the other hand, according to the respondents, the lower court has rightly released them on bail as mere filing of the chargesheet during the pendency of the bail application cannot defeat the indefeasible right accrued to the respondents. Besides, it is argued that the Respondents have already availed of the bail remedy and their

application for modification of the condition was only in furtherence of the bail order passed in their favour. In such a case, there is no question of extinguishment of the right already accrued to them. To support this submission reliance is placed on conclusion No.6 in para 12 of the same decision, where the Apex Court has observed that even if the accused had not furnished the bail before filing of the chargesheet or no order has been passed on the bail application presented by the respondents before filing of the chargesheet that does not mean that the respondents have not already availed of the benefits accrued to them.

7. The limited controversy that needs to be examined is whether the applicant is justified in contending that the indefeasible right accrued in favour of the respondents stood extinguished in the fact situation of the present case or whether the respondents are justified in relying on the observations of clause (6) of the conclusion. I have no hesitation in taking the view that the situation with which this court is confronted in the present case is covered by the conclusion No. 5, as expounded in the decision of Uday Mohanlal Acharya (Supra) at

page 728, which reads thus:-

> "5. If the accused is unable to furnish bail, **as directed by the Magistrate,** then the conjoint reading of Explanation I and proviso to sub-section 2 of section 167, the continued custody of the accused even beyond the specified period in paragraph (a) will not be unauthorised, and, therefore, if during that period the investigation is complete and chargesheet is filed then upon the so-called indefeasible right of the accused would stand extinguished." (emphasis supplied)

8. To get over this position, counsel for the respondents vehemently relied on conclusion No. 6 of the same decision. Before I proceed to consider the said argument, I think it apposite to reproduce conclusion No. 6 of the same decision at page 729, which reads thus :-

> "6. The expression if not already availed

> of used by this Court in Sanjay Dutt's case (supra) must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in paragraph (a) of proviso to sub-section (2) of section 167 if the accused files an application for bail and offers also to furnish the bail, on being directed, then it has to be held that the accused has availed of his indefeasible right even though the Court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same."

9. It is obvious that, conclusion No. 6 considers the purport of expression "if not already availed of". Indeed, it is lastly observed that even though the court has not considered the bail application already filed and has not indicated the terms and conditions of bail and the accused has not furnished the same, even in that situation, it will have to be assumed that the accused has already

availed of the remedy. Relying on these observations, the respondents would contend that the right, which has accrued to them cannot be defeated as that would amount to awarding premium to the prosecution who had sought adjournment of hearing on the bail application on 24th February, 2005. In other words, taking advantage of the adjournment, the prosecution submitted the chargesheet on the next date i.e. on 25th February, 2005, which fact cannot be pressed against the Respondents. The argument seems to be attractive but the same overlooks the observations made by the Apex Court in majority decision in para 12 at page 727, which reads thus :-

> "There is no provision in the Criminal Procedure Code authorising detention of an accused in custody after the expiry of the period indicated in the proviso to sub-section (2) of Section 167 excepting the contingency indicated in Explanation I, namely, if the accused does not furnish the bail. It is in this sense it can be stated that if after expiry of the period, an application for being released on bail is filed, and the accused offers to furnish the bail, and thereby avails

> of his indefeasible right and then an order of bail is passed on certain terms and conditions but the accused fails to furnish the bail, and at that point of time a challan is filed then possibly it can be said that the right of the accused stood extinguished. (emphasis supplied).

. The statement of law contained in conclusion No. 5 is, therefore, restatement of the discussion in para 12, referred to above. In the present case, as the Resopndents failed to furnish sureties in terms of order dated March 01, 2005 till the filing of the present application on March 5,2005, in law, the continued custody even beyond the specified period was not unauthorised and as the chargesheet has already been filed, their right stood extinguished. For, the stated right of the Respondents stood extinguished because of their inability to furnish bail "as directed by the court’s order dated March 01,2005". The inability or failure of the Respondents to furnish the bail, as directed by the court’s order dated March 01, 2005, is reinforced by the applciation moved on their behalf for modification of the bail order. If it is so, the fact that the chargesheet was already

filed during the pendency of the bail application filed by the Respondents will not extricate the case from the application of the legal position flowing from conclusion No.5. Whereas, law expounded in conclusion No. 5 will apply proprio vigore to a case such as the present one. This is so because, in a given case, if the prosecution was to withhold the

chargesheet (instead of filing it in court during the pendency of the bail application) and, instead, filed it immediately on the filing of application by the Accused for modification of the Bail order, the consequences under conclusion No. 5 would come into play so as to hold that the right of the accused stood extinguished. In the present case, the chargesheet is already filed and the prosecution has filed the present application on March 05, 2005 asserting that the right of the accused stood extinguished due to their failure to furnish bail as directed by the court on March 01, 2005.

10. Viewed in this perspective, there is little room to argue that inspite of filing of the chargesheet, the indefeasible right of the respondents

has not extinguished as is contended on behalf of the respondents. Counsel for the respondents has also placed emphasis on the observations in the minority judgment to support his submission. However, it is not open for this court to accept the submission of the respondents on the basis of the observations in the minority view of the Apex Court.

11. Accordingly, in my opinion, this application should succeed as the so called indefeasible right of the respondents stood extinguished in the fact situation of the present case. The order passed by the lower court, which is impugned in this application is, therefore, set aside.

12. Application allowed in the above terms.

13. Ordered accordingly.

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